STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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| In the Matter of:<br>MR. ARTICHOKE, INC.<br><br>Employer,<br><br>and<br><br>United Farm Workers of America, ALF-CIO<br><br>Petitioner. | CASE NO. 75-RC-136-M<br><br>2 ALRB No. 5<br><br>DECISION ON CHALLENGED BALLOTS |

On September 29, 1975, an election was conducted among the agricultural employees of the employer, Mr. Artichoke, Inc. The tally of ballots, served upon the parties after the election, shows the following results: Void Ballots = 0 ; Votes for Petitioner = 12; Votes for No Labor Organization = 8; Challenged Ballots = 4. The Board received and considered the report on challenged ballots issued by the Acting Regional Director of the Salinas Board Office, on November 19, 1975. Further supplemental reports were issued on December 19, 1975 and December 26, 1975. Exceptions to the conclusions and recommendations of the Regional Director's report on challenged ballots were filed by both the employer and the petitioner.

The Board makes the following findings of the fact and conclusions of the law in respect to the challenged ballots in this election:

Findings of Fact:

1) The Giannotti Ballots. The ballots of Augustine and Georgia Giannotti were challenged on the grounds that they were not agricultural employees within the meaning of §1140.4(b) of the Act. The Regional Director's report indicated that both Augustine and Georgia Giannotti work at a roadside stand selling artichokes for Mr. Artichoke, Inc. They sell other produce whose origins are uncertain which comprise approximately 10% of the stands sales. Additionally, other commercial products such as soft drinks, candy, honey, dried food, hot sandwiches, and packaged nuts are sold and represent approximately 50% of the food sold at the stand. These products are not grown, harvested or processed by the employer. Georgia Giannotti has been working at the stand since June, 1971, and her husband was hired subsequently to help her. Neither has ever picked produce in the field. Both Giannotti's work apart from other workers, and while they receive the same hourly pay as the other workers, they are the only workers to be paid time and a half for overtime work.

Conclusion:

In determining whether to sustain the challenge to the ballots of Mr. and Mrs. Giannotti we must determine whether they are agricultural employees within the meaning of §1140.4(b) of

the Labor Code, and thus eligible to vote in this election.[1] Section 1140.4(b) requires that this Board follow the policy of the National Labor Relations Board in being guided by the definition of "agriculture" provided in §3 (f) of the Fair Labor Standards Act.[2]

Section 3(f) of the Pair Labor Standards Act reads, in pertinent part, as follows:

> ". . .agriculture, includes farming in all its branches and among other things includes. . .the production, cultivation, growing and harvesting of any agricultural . . .commodities. . .and any practices. . .performed by a farmer or on a farm as an incident to or in conjunction with such farming operations . . . ." Fair Labor

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[1]Standards Act of 1938 S3(f); Title 29 C.F.R. §203 (f).

Section 1140.4(b) of the Labor Code reads as follows:

"The term 'agriculture employee' or 'employee' shall mean one engaged in agriculture, as such term is defined in sub-division (a). However, nothing in the sub-division shall be construed to include any person other than those employees excluded from the coverage of the National Labor Relations Act, as amended, as agricultural employees, pursuant to §2(3) of the Labor Management Relations Act (§152(3), Title 29, United States Code), and §3(f) of the Fair Labor Standards Act (§203(f), Title.29, United States Code)."

[2]The National Labor Relations Board has frequently stated that it is its policy to be guided by the interpretation of §3(f) adopted by the Department of Labor in view of that agency's re-sponsibility and experience in administering the Fair Labor Standards Act. D'Arrigo Brothers Company of California, 171 NLRB No. 5 (1968).

Commenting on that definition in Farmers Reservoir Irrigation Company v. McComb, 337 U.S. 755 (1949), the U.S. Supreme Court said:

> "As can be readily seen this definition has two distinct branches. First, there is a primary meaning. Agriculture includes farming and all its branches. Certain specific practices such as cultivation and tillage of the soil, dairying, etc., are listed as being including in this primary meaning. Second, there is a broader meaning. Agriculture is defined to include things other than farming as so illustrated. It includes any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidental to or in conjunction with 'such' farming operations." Id. at 762.

In the instant case, the claim of eligibility as agricultural employees for Mr. and Mrs. Giannotti must be found within the "other incidental practices" definition of §3(f).

The Courts have held that work may qualify as a practice incident to or in connection with farming only if it is performed by farmer or on a farm[3] and that the practice is incidental to such farming operation.

[3]There is nothing in the record of where the stand, in which the Giannotti's work, is located. Such facts should be part of

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From the inception of the Fair Labor Standards Act an essential requisite of the exemption has been that the incidental activity must be that of the farmer, as distinguished from the farming operation of other farmers. In his earliest interpretative bulletin dealing with the subject (Interpretative Bulletin No.14, Para. 10(f), August, 1939; 1940 WHM 185) the agency's administrator stated the rule this way:

> "It must be emphasized with respect to all practices performed by a farmer, for which a claim is made that they are incident to or in conjunction with his farming operations, that they must be performed only on the agricultural and horticultural commodities, dairy products, livestock, bees, fur bearing animals, or poultry produced or raised by him." See also Title 29, Labor, C.F.R. §790.158 (c); Mitchell v. Huntsville, 263 F. 2d 913.

This means quite clearly that the practices in question must relate to the farmers own farming operation and products and not to the operations and products of another. Mitchell v. Huntsville Wholesale Nurserys, 267 F. 2d 286. Thus, the processing of commodities of other farmers is not within the definition of agriculture. Bowie v. Gonzales, 117 F. 2d 11 (1941).

In the case of Mr. and Mrs. Giannotti, it is uncontroverted that they sell other produce as well as other commercial products such as soft drinks, candy, honey, dried food, hot sandwiches, and packaged nuts which are not grown, harvested or processed by the employer. Such items account for approximately

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the record in such proceedings, but in light of our findings in regard to the commercial nature of the stand we need not remand for further evidence in this case.

60% of the items sold.[4] Part of the produce sold at the roadside stand were artichokes grown by the employer, Mr. Artichoke, Inc., but the selling of produce of other farmers, as well as the sale of commercial products from other producers, cannot be said to be an incident to the farming operations of Mr. Artichoke, Inc. See NLRB v. Olaa Sugar Co., 242 F. 2d 214; Bowie v. Gonzales, 117 F. 2d 11. These employees are involved in the employers retail operation and are not agricultural employees within the meaning of §1140.4(b) of the Labor Code. Augustine and Georgia Giannotti are not agricultural employees eligible to vote and the challenged to their ballots are sustained.

Since the remaining challenged ballots could not determine the outcome of this election we do not express an opinion on the validity of those ballots.

Dated: January 8, 1976

ROGER M. MAHONY, CHAIRMAN

LEROY CHATFIELD

JOSEPH R. GRODIN

RICHARD JOHNSEN, JR.

JOE C. ORTEGA

[4]The employer in his exceptions to conclusions and recommendations to the Regional Director's report on challenged ballots provides no basis to dispute this finding.